

**BEFORE THE WATER MANAGEMENT BOARD OF THE  
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES  
STATE OF SOUTH DAKOTA**

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IN RE: REQUEST OF MINERAL MOUNTAIN  
RESOURCES FOR TEMPORARY PERMIT TO  
USE PUBLIC WATERS

)  
) **PETITION TO OPPOSE AND**  
) **CONTENT REQUEST FOR**  
) **TEMPORARY WATER PERMIT,**  
) **TO DELAY THE SCHEDULED**  
) **HEARING DATE, TO**  
) **SCHEDULE THE HEARING IN**  
) **RAPID CITY, AND IN THE**  
) **ALTERNATIVE TO REQUEST**  
) **A DECLARATORY RULING**  
)

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COME NOW PETITIONERS A. GAY KINGMAN, STEVEN C. EMERY, JAMES PICOTTE AND ROBIN ZEPHIER and submit this Petition to Oppose and Contest the pending Request by Mineral Mountain Resources (SD), Inc. (“MMR-SD”) of Suite 401-1195 West Broadway, Vancouver, British Columbia, Canada, for a temporary water permit of up to 1.8 million gallons of public water from Rapid Creek and at a rate of approximately 200 gpm for mining exploration near Rochford, South Dakota, upstream from Pactola Reservoir.

The Chief Engineer of the Water Rights Program, Department of Environment and Natural Resources (“DENR”), has by letter to FMG Engineering dated September 4, 2018, chosen to defer issuance of the temporary permit and submitted the application to the Water Management Board (“Board”) for action.

Petitioners request that the Board initiate a contested case concerning the Request of MMR-SD; that the Board permit Petitioners and other interested parties to participate fully in the proceedings; and that the Hearing on the Request be continued from October 4, 2018 in Pierre, South Dakota, until a later date when it can be scheduled and accommodated in Rapid City, South Dakota., containing the impacted community.

In the alternative, Petitioners request that the Board issue a declaratory ruling, pursuant to S.D.C.L. § 1-26-15, that issuance of a temporary permit to use public waters for mineral exploration under circumstances such as those present in this case would be arbitrary, capricious, and contrary to the laws of the State of South Dakota.

In support of this Petitioner, Petitioners state as follows:

### **PRELIMINARY STATEMENT**

This action concerns a Request by MMR for a temporary permit to use public water from Rapid Creek for mineral exploration near Rochford, South Dakota. MMR-SD intends to engage in mineral exploration pursuant to an Exploration Notice of Intent (“EXNI”) EXNI-427 that was originally issued, in violation of law, to Mineral Mountain Resources Ltd. (“MMR-LTD”), a foreign corporation that is not authorized to do business in this State and that was transferred, in violation of law, from the foreign corporation to MMR-SD.

Petitioners submit that EXNI-427 is void and invalid and incapable of being transferred to MMR-SD and that any mineral exploration undertaken pursuant to EXNI-427 is or would be unlawful. Petitioners submit that it would be unlawful for the Board to permit the use of public waters for mineral exploration undertaken pursuant to an EXNI that is void, invalid, and unlawfully transferred to MMR-SD.

Petitioners further submit that issuance of a temporary water permit for gold exploration in the Black Hills is contrary to the public interest in that the proposed water use and gold exploration will pollute or otherwise adversely affect the land, natural resources, and water in the Black Hills and will pollute or otherwise adversely affect the flow of water in Rapid Creek, which feeds Pactola Reservoir, which is the largest reservoir in the Black Hills and provides drinking water to

residents and persons who visit Rapid City, South Dakota, and the proposed water use and gold exploration will cause noise and disruption and interfere with the solitude of the Black Hills.

Petitioners ask the Board to deny the Request for Temporary Permit to Use Public Waters.

### **PARTIES**

Petitioner A. Gay Kingman is a member of the Cheyenne River Sioux Tribe. She owns property and resides in Rapid City, South Dakota. Her address is 1926 Stirling Street, Rapid City, South Dakota 57702.

Petitioner Steven C. Emery is a member of the Cheyenne River Sioux Tribe and a resident of Rapid City, South Dakota. His address is 2120 Rena Place, Rapid City, South Dakota 57701.

Petitioner James Picotte is a member of the Cheyenne River Sioux Tribe and a resident of the Cheyenne River Indian Reservation in South Dakota. His address is P.O. Box 1101, Eagle Butte, SD 57625.

Petitioner Robin Zephier is a member of the Cheyenne River Sioux Tribe. He owns property and resides in Rapid City, South Dakota. His address is 3020 Sunny Hill Circle, Rapid City, SD 57702.

Mineral Mountain Resources (SD), Inc. (“MMR-SD”) is a domestic corporation organized and existing under the laws of the State of South Dakota. It is described as a subsidiary corporation of Mineral Mountain Resources Ltd. (“MMR-LTD”), which is a foreign corporation organized and existing under the laws of British Columbia, Canada. MMR-LTD does not, and at all times relevant to this action did not, have a certificate of authority from the Office of the Secretary of State to conduct business in South Dakota, pursuant to S.D.C.L. § 47-1A-1501.



## **STATEMENT OF THE CASE**

### **A. Mineral Exploration**

MMR-LTD filed a Notice of Intent to Conduct Mineral Exploration Operation with DENR on April 17, 2017. Through the Notice, MMR-LTD sought permission to drill exploratory holes in an area of the Black Hills southeast of Rochford, South Dakota. The Notice anticipated twelve (12) drill-hole locations with up to ten (10) holes being drilled at each location. It was also anticipated that holes would be drilled to depths up to 4,000 feet.

In the Notice of Intent, MMR-LTD represented that it had the authority to conduct an exploration operation on the lands described in the application. This is one of the requirements for approval of an exploration operation. *See* S.D.C.L. § 45-6C-7(8). The representation, however, was erroneous. MMR-LTD was not registered or qualified to do business in the State of South Dakota and did not have authority to conducting an exploration operation on the lands described in the application.

DENR approved the Notice on June 9, 2017, finding it to be “procedurally complete,” while imposing twelve (12) restrictions on the Notice and the mineral operation authorized under the Notice.

On October 10, 2017, DENR received an application to transfer Exploration Notice of Intent, EXNI-427, from MMR-LTD to MMR-SD. The Board of Minerals and Environment held a hearing on the application for transfer on January 18, 2018. According to the Board Minutes, at the beginning of the hearing, Eric Holm, an Engineer from DENR, explained that: “The reason for the transfer is that in reviewing EXNI-427, DENR discovered that Mineral Mountain Resources Ltd. was not registered to do business in South Dakota. The company’s subsidiary, Mineral Mountain Resources (SD), Inc., is registered to do business in the state.”

MMR-SD also explained at the hearing that the transfer was necessary because MMR-LTD is not qualified to do business in South Dakota. The Board Minutes state:

Max Main [lawyer for MMR-SD and MMR-LTD] stated that the transfer is needed because it is a corporate organization decision; they want to transfer the EXNI to the South Dakota entity. Regarding registration with the Secretary of State, Mr. Main stated that he does not believe Mineral Mountain Resources Ltd. has qualified to do business in the state of South Dakota, that is another reason the EXNI is being transferred to Mineral Mountain Resources (SD), Inc., which is registered with the South Dakota Secretary of State and is qualified to do business in the state of South Dakota.

Petitioners contend that EXNI-427 is void, invalid, and incapable of being transferred from MMR-LTD to MMR-SD. The Supreme Court of the State of South Dakota has noted that the business and contracts of a foreign corporation that does not have authority to transact business in the State are void:

foreign corporations are prohibited from transacting business therein until they have complied with the terms upon which permission is granted, and that contracts in violation of a statute are void.

*American Copying Co. v. Eureka Bazaar*, 108 N.W. 15, 16 (S.D. 1906) (citation omitted).

In *American Copying Co.*, the court discussed with approval the case of *Cincinnati Mutual Health Assurance Co. v. Rosenthal*, 55 Ill. 85 (1870), in which the court held that, under a statute prohibiting foreign insurance companies from transacting business in the State without first producing a certificate of authority from the auditor of the State:

a promissory note, given to an insurance company which had not complied with the statute, was void, and could not be enforced .... When the Legislature prohibits an act, or declares that it shall not be lawful to perform it, every rule of interpretation must say that the Legislature intended to interpose its power to prevent the act, and, as one of the means of its prevention, that the courts shall hold it void. This is as manifest as if the statute had declared that it should be void.

*Id.* at 18. See 36 AM. JUR. 2D FOREIGN CORPORATIONS § 253 (Feb. 2018) (discussing *American Copying Co.* and noting that “[a] statute prohibiting a noncomplying corporation from suing in the

state courts on any contract is held by some courts to render the contract void and unenforceable by the corporation even after it has complied with the statute”).

In *Mandel Bros. v. Henry O’Neill, Inc.*, 69 F.2d 452 (8th Cir. 1934), the court held that, under South Dakota law, the acts of a foreign corporation that has not complied with the statutory prerequisites to do business in the State are void and unenforceable. The court affirmed the holding of trial court:

That by reason of appellant’s failure to comply with the laws of South Dakota relating to foreign corporations the promissory notes in suit were void and unenforceable.

*Id.* at 454. *See also id.* at 457.

At the hearing on January 18, 2018, the Board of Minerals and Environment voted to approve the transfer of EXNI-427 from MMR-LTD to MMR-SD. Petitioners contend that the Board’s transfer of EXNI-427 to MMR-SD was improvident and contrary to law.

## **B. Temporary Water Permits**

MMR-LTD applied for a Temporary Permit to Use Public Waters, which was granted on May 2, 2017. This permit, issued by the Chief Engineer, granted MMR-LTD the right to withdraw 1,800,000 gallons of water from Rapid Creek for mineral exploration. The permit expired on December 31, 2017.

A subsequent Temporary Permit to Use Public Waters was issued by the Chief Engineer to MMR-SD on or about January 2, 2018. That permit expired on May 1, 2018.

MMR-SD applied for another Temporary Permit to Use Public Waters on or about April 5, 2018.

On April 17, 2018, the Pennington County Board of Commissioners passed a resolution to request the State Water Management Board to conduct public hearings in Pennington County for



the potential issuance of any temporary or permanent water use permit by any Mineral Mining Operation. In the resolution, the Pennington County Board of Commissioners stated:

[M]ost residents of Pennington County are provided drinking water through the Rapid Creek Watershed, Pactola Lake and Deerfield Lake; and ...

clean drinking water for Pennington County residents is the highest use of water from our Pennington County watersheds, including Rapid Creek, Pactola Lake and Deerfield Lake; and ...

the Pennington County Board of Commissioners feels it is critical for the State Water Management Board to conduct public hearing(s) where the people who may be most affected are located prior to the issuance of any temporary or permanent water use permit by any mineral mining operation, which could potentially impact the drinking water supplies ...

On April 25, 2018, DENR reported that:

A number of requests have been received by DENR requesting that the Chief Engineer either deny the application or defer issuance of the temporary permit to the Water Management Board to allow for a public hearing by the board. Administrative Rule of South Dakota 74:02:01:34 gives the authority to the Chief Engineer to defer issuance of a temporary permit and present the application to the Water Management Board for action. As requested, the Chief Engineer is deferring the decision to the Board on this pending application. Therefore, the May 2 & 3, 2018, agenda of the Water Management Board includes an administrative item requesting the Board to set a date and location to consider the temporary permit application from Mineral Mountain Resources. The Chief Engineer will suggest the Board set a hearing date in Rapid City, but the Board will make the final decision on when and where to meet. If the Board sets the date and location, a meeting room will be secured, and the public will be notified of the date, time, and place of the Board meeting by posting the details on the DENR One-Stop Public Notice webpage, on this webpage, and by press release.

On April 30, 2018, DENR reported that MMR-SD withdrew its Request for Temporary Permit to Use Public Waters. It was reported that MMR-SD bought water from the City of Lead and trucked the water to the exploration sites near Rochford.

On or about September 6, 2018, MMR-SD filed the present Request for a Temporary Permit to Use Public Waters.

### **C. Interests of Petitioners**

Petitioners are members of the Cheyenne River Sioux Tribe and traditional Lakota religious practitioners. The Black Hills are sacred to the Lakota, and Petitioners consider the Black Hills and the land, water, and other natural resources in the Black Hills to be sacred. One or more Petitioners participated in the recovery of a sacred site, Pé Sla, that is near the gold exploration area. All Petitioners pray, perform or participate in religious ceremonies, and receive divine wisdom in the Black Hills in close proximity to the gold exploration area.

Petitioners consider the proposed water use and gold exploration by MMR-SD to be a desecration of the sacred Black Hills. The proposed water use and gold exploration will interfere with their ability to worship, perform and participate in ceremonies, and receive divine wisdom in the Black Hills.

Petitioners allege that the proposed water use and gold exploration will harm the land, natural resources, and water in the Black Hills, causes noise and disruption, and interferes with the solitude of the Black Hills. The gold exploration already undertaken has damaged the physical environment. Among other things, the U.S. Forest Service reports that MMR-SD caused damage to Forest Service roads near Rochford and Pé Sla by the use of heavy vehicles or equipment. Many of those roads are unpaved. The Forest Service required MMR-SD to halt its use of the roads until they could be repaired. Petitioners use these roads.

Petitioners purchase or use municipal water from the City of Rapid City. They use the water for domestic use, including drinking water. If the water is contaminated, they cannot use it.

Petitioners use Rapid Creek for recreational and spiritual purposes, including wading, walking, fishing, photography, and prayer. If the water in Rapid Creek is contaminated, they cannot use it for recreational or spiritual purposes.



Petitioners have an interest in protecting the land, natural resources, and water in the Black Hills and the clean flow of water in Rapid Creek. They assert that the proposed water use and gold exploration will pollute or otherwise adversely affect the land, natural resources, and water in the Black Hills and will pollute or otherwise adversely affect the flow of water in Rapid Creek, which feeds Pactola Reservoir, which is the largest reservoir in the Black Hills and which provides drinking water to residents and persons who visit Rapid City, South Dakota.

EXNI-427 indicates that drill cuttings will be dispersed in the disturbed area during site reclamation. Pyrite will likely occur in the drill cuttings. When pyrite is exposed to the atmosphere, it oxidizes and generates sulfuric acid. If the cuttings are dispersed on the surface and not otherwise properly treated, the presence of this acid will decrease the success of revegetation, thereby potentially impacting surface water in the area via increased sediment yields and associated sedimentation and mineralization of local streams. Leachate from the acidic cuttings may also impact groundwater in the area.

If contaminants are introduced into the environment during MMR-SD's drilling operations, these contaminants may impact all of the sources of water upon which Rapid City relies for its municipal supplies and may pose a threat to all of the protected beneficial uses of water in Rapid Creek, including the use of this water for domestic water supplies, cold water permanent fish life propagation, wildlife propagation, stock watering, irrigation, immersion recreation, and limited-contact recreation.

Petitioners' concerns are also corroborated by prior experience. While conducting mineral exploration in South Dakota in 2013, MMR-LTD was issued a Notice of Violation from the DENR on or about March 22, 2013, for causing an unauthorized discharge of drilling fluids to enter and

degrade the natural quality of the water in Battle Creek in connection with drilling operations near Keystone in the Black Hills.

Further, the United States, the State of South Dakota, and the Cheyenne River Sioux Tribe were required to sue the Homestake Mining Company to stop the environmental pollution of Gold Mine Creek, White Wood Creek, Cheyenne River and Missouri River by virtue of the mining operations in Lead, South Dakota, in the Black Hills. White Wood Creek was a Super Fund Site that required millions of dollars of clean-up and years of work. Livestock were killed, people's homes were polluted, and the water quality was degraded.

Petitioners do not want a similar situation to develop on Rapid Creek. These prior experiences indicate that the State Water Management Board should have a public hearing in Rapid City on any proposal for gold mining along Rapid City's main source of drinking water.

Under South Dakota law, "[i]t is the responsibility of the state to ensure that ... [b]oth during an after an exploration operation water and other natural resources are not endangered." S.D.C.L. § 45-6C-2(2).

If the Request for Temporary Permit to Use Public Waters is granted, Petitioners will suffer the denial of some claim of right, either of person or property, including but not limited to their right to a clean environment and a clean flow of water in Rapid Creek and Pactola Reservoir, for their health and livelihood, and their right to enforcement of South Dakota laws prohibiting unauthorized conduct by foreign corporations that are not registered or qualified to do business in the State.

### **RELIEF REQUESTED**

Petitioners seek a decision from the Board denying the Request for Temporary Permit to Use Public Waters (“Request”) and declaring that approval of the Request would be arbitrary, capricious, and contrary to law in that, among other things:

a. MMR-SD seeks to use public water for mineral exploration under EXNI-427, which was transferred to MMR-SD from MMR-LTD;

b. EXNI-427 is void and invalid and was incapable of being transferred because it was issued to MMR-LTD, a foreign corporation organized and existing under the laws of British Columbia, Canada, and that corporation did not, and does not, have a certificate of authority from the Office of the Secretary of State to transact business in the State of South Dakota, pursuant to S.D.C.L. § 47-1A-1501, and was not, and is not, eligible to file a notice of intent to conduct a mineral exploration operation (or an application for the transfer of an exploration notice of intent (“EXNI”)) or to receive permission to engage in mineral exploration in South Dakota, under S.D.C.L. ch. 45-6C or otherwise; and

c. EXNI-427 is void and invalid and was incapable of being transferred because it was issued to MMR-LTD based on erroneous information and the erroneous premise submitted by MMR-LTD that it had the authority to conduct an exploration operation in South Dakota; and

d. EXNI-427 is void and invalid and was incapable of being transferred because it did not comply with the requirements of S.D.C.L. ch. 45-6C in that, among other things, MMR-LTD did not have “the authority to conduct an exploration operation on the lands described” in the applications, as required by S.D.C.L. § 45-6C-7; and



e. EXNI-427 could not be transferred pursuant to S.D.C.L. § 45-6C-53, because the mineral exploration operation was not in compliance, or capable of being brought into compliance, with all applicable local, state, and federal laws pertaining to the operation before the purported transfer of the EXNI because MMR-LTD did not, and does not, have a certificate of authority from the Office of the Secretary of State to transact business in the State of South Dakota, pursuant to S.D.C.L. § 47-1A-1501, and was not, and is not, eligible to file a notice of intent to conduct a mineral exploration operation (or an application for the transfer of an EXNI) or to receive permission to engage in mineral exploration in South Dakota, under S.D.C.L. ch. 45-6C or otherwise, and because the EXNI is otherwise void, invalid, and incapable of being transferred for the reasons set forth herein; and

f. Approval of the Request would be harmful to the environment and natural resources and contrary to the public interest.

In the alternative, Petitioners seek a declaratory ruling that the Board may not approve a request or a temporary permit to use public waters if:

a. The request for a temporary permit to use public waters is for mineral exploration under an EXNI that was improvidently issued to a foreign corporation that did not, and does not, have a certificate of authority from the Office of the Secretary of State authority to transact business in the State of South Dakota, pursuant to S.D.C.L. § 47-1A-1501, and was not, and is not, eligible to file a notice of intent to conduct a mineral exploration operation (or an application for the transfer of an EXNI) or to receive permission to engage in mineral exploration in South Dakota, under S.D.C.L. ch. 45-6C or otherwise;

b. The request for a temporary permit to use public waters is for mineral exploration under an EXNI that is void and invalid and incapable of being transferred because it was improvidently issued to a foreign corporation based on erroneous information and an erroneous premise submitted by the corporation that it had the authority to conduct an exploration operation in South Dakota;

c. The request for a temporary permit to use public waters is for mineral exploration under an EXNI that is void and invalid and incapable of being transferred because it did not comply with the requirements of S.D.C.L. ch. 45-6C in that, among other things, the corporation to which the EXNI was originally issued (or transferred) did not have “the authority to conduct an exploration operation on the lands described” in the application, as required by S.D.C.L. § 45-6C-7; and/or

d. The request for a temporary permit to use public waters is for mineral exploration under an EXNI that is void and invalid and incapable of being transferred because it was improvidently transferred because the mineral exploration operation was not in compliance, or capable of being brought into compliance, with all applicable local, state, and federal laws pertaining to the operation before the transfer of the EXNI because the EXNI was issued to a foreign corporation that did not, and does not, have a certificate of authority from the Office of the Secretary of State authority to transact business in the State of South Dakota, pursuant to S.D.C.L. § 47-1A-1501, and was not, and is not, eligible to file a notice of intent to conduct a mineral exploration operation (or an application for the transfer of an EXNI) or to receive permission to engage in mineral exploration in South Dakota, under S.D.C.L. ch. 45-6C or otherwise, and because the EXNI is otherwise void, invalid, and incapable of being transferred for the reasons set forth herein.

The Board has jurisdiction to hold a contested case hearing in this matter pursuant to S.D.C.L. ch. 1-26 and § 1-26-27. The Board has jurisdiction to issue a declaratory ruling pursuant to S.D.C.L. ch. 1-26 and S.D.C.L. § 1-26-15.

Because the Board requested a hearing in this matter, the provisions of S.D.C.L. ch. 1-26 concerning contested cases apply, as dictated by to S.D.C.L. § 1-26-27, and the Board should treat this matter as a contested case, allowing for intervention and full participation by Petitioners and others who have an interest in the matter. The term “contested case” is defined as “a proceeding, including ... licensing, in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency having an opportunity for hearing ....” S.D.C.L. § 1-26-1(2). S.D.C.L. § 1-26-27 provides that: “When the grant, denial, or renewal of a license is required to be preceded by notice and opportunity for hearing, or an applicant, a party or an agency requests a hearing, the provisions of this chapter concerning contested cases apply. The term “license” is defined as “the whole or part of any agency permit, certificate, approval, registration, charter, or similar form of permission required by law.” S.D.C.L. § 1-26-1(4). DENR should treat the Request as a contested case. All of the elements of a contested case are satisfied.

Petitioners certify that on October 3, 2018, they caused true and accurate copies of this Petition to be served, by U.S. mail, facsimile, and electronic mail upon the following:

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WHEREFORE, Petitioners request that the Board initiate a contested case concerning the Request, pursuant to S.D.C.L. § 1-26-27, delay the date of the scheduled hearing, schedule the hearing in Rapid City, South Dakota, and deny the Request, and in the alternative, issue a declaratory ruling, pursuant to S.D.C.L. § 1-26-15, and declare that approval of a request for a temporary permit to use public waters under the present circumstances would be arbitrary, capricious, and contrary to law.

Dated: October 3, 2018

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